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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

JOHN HERNANDEZ, on behalf of himself and
all others similarly situated,

Plaintiff,

vs.

ENTERTAINMENT SHOPPING, INC.,

Defendant.

E-filing

HRL

CV 11

1353

Case No. _____

COMPLAINT

DEMAND FOR JURY TRIAL

CLASS ACTION

CLASS ACTION COMPLAINT

FILED
2011 MAR 21 P 3:34
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

464
X

1 Plaintiff John Hernandez, on behalf of himself and all others similarly situated, alleges as
2 follows:

3 **NATURE OF THE CASE**

4 1. Defendant operates the “entertainment shopping” website Swoopo.com, which hosts
5 online auctions. Plaintiff alleges the Swoopo auctions constitute lotteries under California law and thus
6 violate both California Penal Code § 319 and California’s Unfair Competition Law (UCL), Cal. Bus. &
7 Prof. Code § 17200, *et seq.* Plaintiff seeks injunctive and restitutionary relief under the UCL.

8 **PARTIES**

9 2. Plaintiff John Hernandez is a citizen and resident of Philadelphia, Pennsylvania.

10 3. Defendant Entertainment Shopping, Inc., is a privately held corporation incorporated in
11 Delaware with its principle place of business in Mountain View, California.

12 **JURISDICTION AND VENUE**

13 4. This Court has personal jurisdiction over Entertainment Shopping, Inc., because the
14 company is headquartered and will be served in this state, and has subject matter jurisdiction under the
15 Class Action Fairness Act, 28 U.S.C. § 1332(d), because the proposed class—more than two-thirds of
16 which lives outside this state—consists of more than 100 class members with aggregated claims
17 exceeding \$5,000,000, exclusive of interests and costs.

18 5. Venue is proper in this District under 28 U.S.C. § 1391(a) because a substantial part of
19 the events or omissions giving rise to the Plaintiff’s claims occurred in this judicial district.

20 6. Defendant’s Terms and Conditions, which can be found on the Swoopo website, include
21 an agreement “to submit to the exclusive jurisdiction of the courts located within the county of Santa
22 Clara, California” and call for the application of “the laws of the State of California without regard to its
23 conflict of laws provisions.” (A copy of the Terms and Conditions are attached as Exhibit A.)

24 **INTRADISTRICT ASSIGNMENT**

25 7. Assignment to the San Jose division of this District under Local Rule 3-2 is proper
26 because a substantial part of the events or omissions giving rise to Plaintiff’s claims occurred in Santa
27 Clara County.
28

SUBSTANTIVE ALLEGATIONS

8. Defendant operates the “entertainment shopping” website Swoopo.com and hosts over 10,000 auctions each month. The Swoopo auctions feature items such as digital cameras, notebook computers, and gift cards.

9. On the Swoopo.com home page, at any given time there are a number of auction listings, along with the items’ current prices and the time remaining before the auctions close. For example, a “New iPad 2” might be listed with a current price of \$1.40 and an auction end time in 28 seconds. Many of the listed prices appear very low, especially considering what appear to be quickly approaching end times.

10. The listed prices are often well below what the items would retail for elsewhere because the prices in a standard Swoopo auction begin at less than one dollar and increase in one-cent intervals when bids are cast. Bidders must pay 60 cents for each of their “penny” bids, even though each bid corresponds to only a one-cent increase in the item’s price. If the “New iPad 2” ends up selling for \$10, for example, it will have cost all bidders involved about \$610 collectively (1,000 bids at 60 cents each, plus the \$10 sale price).

11. The listings will often last far longer than the end times that appear to be rapidly approaching. Each time a bid is placed on an item, the end time for the auction is pushed off by up to 40 seconds. This means that many Swoopo auctions are “in their final seconds” for days, and participants must repeatedly choose whether to chance an additional 60 cents for a shot at winning the prize at its low price.

12. A partial screen shot of Swoop.com on March 16, 2011, appears below:

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SWOOP Entertainment Shopping

Home | My Swoopo | Help | Register

Username: LOGIN

11,980 people like this. Be the first of your friends.

Brand New Products for Bargain Prices!
The hottest brands and coolest deals.

1 Register & Buy Bids
You'll need them to bid on auctions.

2 Choose Your Product
Pick a product from our big selection.

3 Bid & Win
Be the last bidder when the time runs out.

SIGN UP

Browse Live Auctions

Bid now - these auctions are about to end

50 Bids 00:04:28 \$1.85 igvnonstop BID	\$100 Best Buy Gift Card 00:00:15 \$6.19 Slegers312 BID	All-Clad Stainless Steel 10-Piece Cookware Set 00:00:15 \$10.47 urquattro BID	Club Glove Burst Proof 2 Wheeled Travel 00:03:03 \$1.04 daemooon BID	100 Bids 00:10:02 \$0.03 givetomenow BID
Viewsonic G-Tablet with 10-Inch Multi-Touch LCD Screen 50 Bids	TaylorMade Rossa Corza Ghost Putters 50 Bids	Nikon D90 12.3 MP DSLR Camera with 18-105mm Kit 50 Bids	Killzone 3 for PS3 50 Bids	

Internet 100%

13. Because of the nature of the process, most of the items on Swoopo never reach their typical retail sales price. The decision whether to bid therefore is not closely tied to the *value* of the item, and mostly has to do with whether a bidder wants to risk another 60 cents for the chance to win. Swoopo auctions end when only one remaining person chooses to risk 60 cents for another chance to win the prize. Bidders' prospects for winning depend solely on whether other bids come in after their own, something bidders can't know in advance and can't control. In the end, the winner may have won the prize with his very first bid, or he may have spent more on bids than what the item would have sold for in a retail location.

14. Many of those who have studied the Swoopo auctions have noted the predominance of chance inherent in the process:

"In essence, what your 60-cent bidding fee gets you at Swoopo is a ticket to a lottery, with a chance to get a high-end item at a ridiculously low price."

<http://www.washingtonpost.com/wp-dyn/content/article/2009/07/11/AR2009071100684.html>

1 “You have no way of knowing if your bid will win, or if someone else will swoop in and bid
2 on the laptop at the last possible second. In other words, it's just like a slot machine: you put
3 in a quarter and wait for the wheels to whirr. With swoopo, the random number generator is
4 other people.”

5 <http://scienceblogs.com/cortex/2009/07/swoopo.php>

6 “Swoopo’s business model is nothing but a modified lottery.”

7 <http://businessmodelinstitute.com/swoopo-com-sells-ipad-for-17739/>

8 I marvel at its operators’ ability to create what must be a moneymaking machine and at its
9 users’ willingness to buy lottery tickets in the guise of online auction bids.

10 <http://www.personalfinanceanalyst.com/if-you-like-the-lottery-youll-adore-swoopo/>

11 15. Indeed, Swoopo auctions bear many similarities to traditional lotteries, casino games, and
12 sports wagering. Defendant makes much of its money by providing the “playing field” for bidders to
13 gamble, rather than on the actual sale of the items. As Defendant’s North America general manager has
14 acknowledged, “The thrill of winning one of the auctions that ends at a very low price is what keeps
15 customers coming back.”

16 16. As with traditional lotteries and other such activities, the Swoopo auctions exploit a
17 number of common decision making flaws. Most notably, many people struggle with the concept of
18 *sunk costs*, meaning they do not realize that all of their previous bids on an item have already been lost
19 and do not make them any more likely to win the auction. In other words, many people struggle to
20 understand that each 60-cent bid is a brand new chance to win and, once another bid follows it, the bid
21 will play no role in who wins the auction going forward and should not affect one’s decision whether to
22 bid again. Swoopo auctions also exploit the difficulty consumers have making snap decisions,
23 especially regarding small amounts of money, and take advantage of fallacies such as (a) *loss aversion*,
24 where one’s urge to avoid a loss is typically much more powerful than one’s urge to seek a gain, (b)
25 *anchoring*, where one focuses on a particular number and loses track of the larger picture, and (c) the
26 irrational impulse to believe there is always a strategy to beat the system.

27 17. Since Swoopo is marketed as “entertainment shopping” rather than as a lottery, Swoopo
28 has not been subjected to the same scrutiny as traditional lotteries and other such activities, though the

1 prize awarded in Swoopo auctions can be cash or a cash substitute (such as a gift certificate or more
2 Swoopo bids, which can be used in future auctions).

3 18. The marketing of Swoopo auctions and the disclosures on the Swoopo website leave
4 many consumers confused about the process and the true nature of the auctions. Like in a traditional
5 lottery or in other similar unlawful or highly regulated games of chance, many people do not initially
6 realize the rate at which they'll be spending money, their chances of winning, and other important
7 factors. Most fundamentally, people do not realize the risk inherent in each bid. As a result, millions of
8 people purchase bids on Swoopo when "from a game-theory perspective . . . the only winning strategy
9 is not to play at all." (<http://blog.revolutionanalytics.com>.)

10 19. Plaintiff John Hernandez spent \$24 on bids on the Swoopo website in March 2011.
11 Plaintiff placed the bids on consumer electronic products in several auctions, without winning any of
12 them.

13 CLASS ACTION ALLEGATIONS

14 20. Plaintiff brings this action on behalf of himself and a class of persons (the "Class")
15 initially defined as "Everyone in the United States who has purchased bids on Swoopo.com after March
16 21, 2007."

17 21. Excluded from the proposed Class are Entertainment Shopping, Inc.; any of its affiliates,
18 parents, or subsidiaries; any entities in which they have a controlling interest; any of their officers,
19 directors, or employees; any of their successors or assigns; anyone employed by counsel for Plaintiff in
20 this action; and any Judge to whom this case is assigned as well as his or her immediate family and staff.

21 22. This action has been brought and may properly be maintained on behalf of the Class
22 proposed above under the criteria of Federal Rule of Civil Procedure Rule 23.

23 23. Numerosity. Members of the Class are so numerous that their individual joinder herein
24 is impracticable. Swoopo has over 2.5 million registered users, most of whom have purchased bids
25 (immediately after registering on Swoopo's website, users are prompted to purchase bids).

26 24. Existence and predominance of common questions. The Class may be certified under
27 Rule 23(b)(3) because common questions of law and fact exist as to all Class members and predominate
28 over any questions affecting only individual members. These common questions include whether:

- a. Swoopo's auctions are lotteries under California law;
- b. The true nature of the lotteries on Swoopo.com are inadequately disclosed; and
- c. Defendant's business practices are unlawful, unfair, or fraudulent in violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*

25. Typicality. Plaintiff's claims are typical of the claims of the Class, because, among other things, Plaintiff purchased bids on Swoopo.com.

26. Adequacy. Plaintiff is an adequate representative of the Class because Plaintiff's interests do not conflict with the interests of the members of the Class Plaintiff seeks to represent. Plaintiff has retained counsel competent and experienced in complex class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff and Plaintiff's counsel will fairly and adequately protect the interests of the Class.

27. Superiority. The class action is superior to other available means for the fair and efficient adjudication of this dispute. The injury suffered by each Class member is not of such magnitude as to make the prosecution of individual actions against Defendant economically feasible. Even if Class members themselves could afford such individualized litigation, the court system could not. In addition to the burden and expense of managing multiple actions arising from Defendant's administration of online lotteries, individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties and the court system presented by the legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

28. In the alternative, the Class may be certified because:

- a. the prosecution of separate actions by the individual members of the Class would create a risk of inconsistent or varying adjudication with respect to individual Class members which would establish incompatible standards of conduct for Defendant, Rule 23(b)(1)(A);
- b. the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them which would, as a practical matter, be

dispositive of the interests of other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests, Rule 23(b)(1)(B); and

- c. Defendant has acted on grounds generally applicable to the Class, thereby making appropriate final and injunctive relief with respect to the members of the Class as a whole, Rule 23(b)(2).

FIRST CAUSE OF ACTION

(For unlawful, unfair, and fraudulent business practices under the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*)

29. Plaintiff, on behalf of himself and the Class, re-alleges as if fully set forth, each and every allegation set forth herein.

30. Defendant's business acts and practices, as alleged in this complaint, constitute unlawful, unfair, and fraudulent practices, in violation of the Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, *et seq.*

31. Defendant is a corporation and thus within the statutory definition of "person" in Cal. Bus. & Prof. Code § 17201.

32. The business practices engaged in by Defendant that violate the Unfair Competition Law include:

- a. Running online lotteries on Swoopo.com; and
- b. Inadequately disclosing the true nature of the lotteries on Swoopo.com to actual and potential customers.

33. The Defendant engaged in unlawful business practices by violating California Penal Code § 319.

34. Swoopo auctions are lotteries under California law because of the presence of (i) a prize, (ii) consideration, and (iii) distribution of the prize by chance.

35. Prize. The prizes vary in Swoopo auctions. The prize is commonly a consumer product like a computer, television, or camera, but is often an item with a fixed monetary value such as cash, fixed-denomination gift certificates, and even additional bids to be used in future auctions.

1 36. Consideration. During Swoopo auctions, participants must pay 60 cents for each bid
2 and must bid to take part and to have a chance to win. Bids are generally nonrefundable, regardless of
3 who wins the auction. The consideration for taking part in the auction is distinct from the ultimate
4 purchase price of the item.

5 37. Chance. As discussed above, when bids are placed, the auction end times are extended
6 up to 40 seconds. Many Swoopo auctions remain “in their final seconds” for an extended period of time
7 and participants are repeatedly put to the decision of whether to risk 60 cents for a chance to win.
8 Participants only win the auction if no one else bids after them, but they do not know and cannot control
9 whether anyone else will bid.

10 38. Defendant engaged in unfair business practices by, among other things:

- 11 a. Engaging in conduct that is immoral, unethical, oppressive, unscrupulous, or
12 substantially injurious to Plaintiff and other members of the Class;
13 b. Engaging in conduct that undermines the policies underlying California Penal
14 Code § 319; and
15 c. Engaging in conduct that causes a substantial injury to consumers, not outweighed
16 by any countervailing benefits to consumers or to competition, which the
17 consumers could not have reasonably avoided.

18 39. Defendant engaged in fraudulent business practices by running online lotteries on
19 Swoopo.com but misleadingly labeling the lotteries as auctions and as “entertainment shopping” and
20 otherwise not adequately disclosing the true nature of the lotteries as well as their costs and bidders’
21 prospects for success.

22 40. As a direct and proximate result of the Defendant’s unlawful, unfair, and fraudulent
23 business practices as alleged herein, Plaintiff and the members of the Class suffered injury in fact and
24 lost money or property.

25 41. Plaintiff and the Class members are entitled to equitable relief including attorney fees
26 and costs under Code of Civil Procedure section 1021.5, declaratory relief, restitution, and a permanent
27 injunction enjoining Defendant from their unfair, fraudulent, and deceitful activity.
28

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on Plaintiff's own behalf and on behalf of the Class, prays for judgment as follows:

- a. For an order certifying the Plaintiff Class and appointing Plaintiff and Plaintiff's counsel to represent the Class;
- b. For an order awarding Plaintiff and the members of the Class restitutionary disgorgement of the gains Defendant received from its unlawful practices;
- c. For an order enjoining Defendant from continuing its unlawful practices as alleged herein;
- d. For an order awarding Plaintiff and the members of the Class pre-judgment and post-judgment interest;
- e. For an order awarding Plaintiff and the members of the Class reasonable attorney fees and costs of suit, including expert witness fees; and
- f. For an order awarding such other and further relief as this Court may deem just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all claims so triable.

DATED: March 21, 2011

Respectfully submitted,

GIRARD GIBBS LLP

By: 

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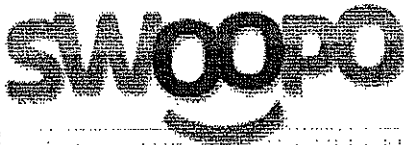
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Attorneys for Plaintiff John Hernandez

EXHIBIT A

3/10/2011

Terms and Conditions



Sign Up to see what your friends like.

Entertainment Shopping
[Home](#) | [My Swoopo](#) | [Help](#) | [Register](#)


Username



LOGIN

Terms and Conditions

(Last update: 17.03.2010)

CONDITIONS OF USE

Welcome to Swoopo. By using the Swoopo service ("Services"), you agree to be subject to the following terms of service ("Terms") including those available by hyperlink, and enter into an agreement with Entertainment Shopping, Inc. and its internet platform www.swoopo.com ("Swoopo"). Swoopo's principal place of business is located at 800 W. El Camino Real, Suite 200, Mountain View, Ca 94040.

By accepting these Terms, you accept that these Terms and the Swoopo Privacy Policy will apply whenever you use Swoopo sites and services, as well as the manner in which Swoopo operate its auctions as described on the Swoopo site. If you use another Swoopo site, you agree to accept the Terms and Privacy Policy applicable to that site. The agreement that applies on any of our domains and sub-domains is always the agreement that appears in the footer of each website. Some Swoopo sites, services and tools may have additional or other terms that we provide to you when you use those sites, services or tools.

None of the content on the Swoopo site, including but not limited to the Help Section, is intended to amount to advice on which reliance should be placed. Swoopo disclaims to the fullest extent permitted by law all liability and responsibility arising from any reliance placed on such materials by you or by anyone who may be informed of any of its contents.

ACCEPTING THE TERMS

You may not use the Services if you do not accept the Terms.

You can accept the Terms by:

(A) clicking to accept or agree to the Terms, where this option is made available to you by Swoopo in the user interface for any Service; or

(B) by actually using the Services. In this case, you understand and agree that Swoopo will treat your use of the Services as acceptance of the Terms from that point onwards.

You may not use the Services and may not accept the Terms if (a) you are not of legal age to form a binding contract with Swoopo, or (b) you are a person barred from receiving the Services under the laws of the United States or other countries including the country in which you are resident or from which you use the Services.

Before you continue, you should print off or save a local copy of the Terms for your records.

3/10/2011

Terms and Conditions

LICENSE AND SITE ACCESS

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Our websites may contain (a) User Content (defined below) provided by other users, (b) links to other sites operated by third parties, (c) advertisements and/or sponsorships provided by third parties, and (d) stores, services, or product lines offered by third parties ((a), (b) , (c), and (d) are collectively, "Third-Party Materials"). We have no control over and are not responsible and assume no liability for any Third-Party Materials or the applicable third parties. We are not responsible for any acts or omissions of such third parties. We do not review, approve, endorse, guarantee, warrant, or make any representations with respect to Third-Party Materials or the applicable third parties. For example, we do not guarantee, warrant or represent that the Third-Party Materials are accurate, legal and/or inoffensive or that these third party sites do not contain viruses or other features that may adversely affect your computer. You use all Third Party Materials and interact with such third parties at your own risk. We are not obligated to be involved in any disputes between you and any such third parties.

When you leave our site, our Terms (including our Privacy Policy) no longer govern. You should carefully review the applicable third party privacy statements and other terms and conditions of use.

Without limiting the foregoing, if you have a problem with a link from any one of our sites, please notify us at support@swoopo.com.

You hereby release us, our subsidiaries, affiliates, officers, employees, agents, and successors from any claim, demands, losses, damages, rights, and actions of any kind, including personal injuries, death, and property damage, that is either directly or indirectly related to or arising from use of Third Party Materials or interactions with or conduct of the applicable third parties. In connection with the foregoing, IF YOU ARE A CALIFORNIA RESIDENT, YOU HEREBY WAVE CALIFORNIA CIVIL CODE SECTION 1542, WHICH STATES "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

LICENSE GRANTED BY YOU

By providing, submitting, uploading any communications, reviews, comments, feedback, postings,

3/10/2011

Terms and Conditions

materials, or other content for use on any of the Swoopo websites ("User Content"), (a) you represent and warrant that you or the owner of all rights to such User Content and that such User Content does not violate our Terms and (b) you hereby grant us, and agree to grant us, an irrevocable, perpetual, royalty-free, fully paid-up, worldwide license (with the right to sublicense) in all languages to use, reproduce, distribute, publicly display, publicly perform, prepare derivative works of, modify, sell and otherwise exploit all or any part of the User Content in our sole discretion by any method now existing or later developed, subject to our Privacy Policy. Subject to our Privacy Policy, any User Content will be treated as non-confidential and non-proprietary and may be disseminated or used by us for any purpose, including, but not limited to, developing, creating, manufacturing or marketing products or services.

REGISTRATION AND PARTICIPATION

Employees and relatives of employees of Swoopo are not eligible to participate in Swoopo auctions under any circumstance.

Swoopo's products and services are offered exclusively to private users and not to commercial or partly-commercial resellers. Swoopo reserves the right to exclude commercial resellers from the participation in the auctions and to close such user accounts at any time.

You may register only once using your postal address (registration using PO Boxes or equivalents is not permitted). Additionally, only one user registration per household is permitted.

In order to access certain Services, you may be required to provide information about yourself (such as identification or contact details) as part of the registration process for the Service, or as part of your continued use of the Services. You agree that any registration information you give to Swoopo will always be accurate, correct and up to date.

During the registration process, you must choose a username. The username must not be offensive, be selected to deceive or mis-inform other users, may not offend common decency or infringe upon the rights of third parties. If Swoopo receives information of a username which is illegal or in breach of these Terms, this username can be amended by Swoopo without prior notice.

You agree and understand that you are responsible for maintaining the confidentiality of passwords associated with any account you use to access the Service and that your user account may be used only by you and not anyone else. Accordingly, you agree that you will be solely responsible to Swoopo for all activities that occur under your account. User accounts created during registration are non-transferable.

RULES, RESTRICTIONS, SUSPENSION

Without limiting other remedies, we may limit, suspend, or terminate our Service and user accounts, prohibit access to our sites and their content, services, and tools, delay or remove hosted content, including any User Content and take technical and legal steps to keep users off the sites if we think that they are creating problems or possible legal liabilities, infringing the intellectual property rights of third parties, or acting inconsistently with the letter or spirit of our policies. We also reserve the right to cancel unconfirmed accounts or accounts that have been inactive for a long time, or to modify or discontinue Swoopo sites, services, or tools.

You agree to the following conditions:

3/10/2011

Terms and Conditions

- You agree to use the Services only for purposes that are permitted by (a) the Terms and (b) any applicable law, regulation or generally accepted practices or guidelines in the relevant jurisdictions (including any laws regarding the export of data or software to and from the United States or other relevant countries). You agree not to post User Content that (i) plagiarizes, violates or infringes upon the rights of any third-party, including trade secret, copyright, trademark, trade dress, privacy, patent, moral right, publicity, or other personal or proprietary rights, and/or (ii) contains unlawful, tortious, threatening, harmful, vulgar, defamatory, false, intentionally misleading, libelous, pornographic, obscene, patently offensive, inappropriate, offensive, harassing, or other unacceptable material or materials that are harmful to minors.
- You also agree not to engage in any activity that circumvents, interferes with or disrupts the Services (or the servers and networks connected to the Services) or any user experience of our Services including but not limited to the following:
 - using any unauthorized third-party bidding software;
 - accessing any of the Services by means other than through the interface provided by Swoopo (e.g. no use of scripts or web crawlers);
 - manipulating our fee structure, the billing process, bidding, auctions or fees owed to Swoopo;
 - distributing spam,, unsolicited, or bulk electronic communications, chain letters, or pyramid schemes; or
 - collecting information about users, including email addresses, without their consent.

You agree that you are solely responsible for (and that Swoopo has no responsibility to you or to any third party for) any breach of your obligations under the Terms and for the consequences (including any loss or damage which Swoopo may suffer) of any such breach. In case of a breach of these Terms, Swoopo reserves the right to withhold deliveries or refunds for Bids.

BIDS

Bidding rights or bids ("Bids") must be purchased and paid for by you prior to online bidding. Bids can be purchased in packages ("BidPacks") as further described under "Bidding" in the "[Help](#)" Section of the Swoopo Site. Prices for Bids or BidPacks may change in Swoopo's discretion from time to time. Bids must currently be placed online through our website. In the future Swoopo may allow Bids to be placed through third party websites or through use of your mobile phone. In such cases, you will be required to disclose your mobile phone number and be responsible for ensuring it is accurate and up to date. For information on when such opportunities may be available in the future, check the "[Help](#)" Section of the Swoopo site.

Bids and voucher Bids are non-transferable and valid for one year after they have been credited to your account. Free Bids are Bids you may get through a promotion or other marketing activity. Free Bids are usually time sensitive and are only valid for the time stated in a promotion. Upon expiration, they become void and can no longer be placed.

Once a Bid is placed in an auction, it is deducted from your Bid account and can no longer be refunded. Refunds will not be issued for Bids placed in an auction, expired Bids, or Voucher Bids and Free Bids. For further information on refunds please see our return policy described under Returns & Complaints in the "[Help](#)" Section.

THE AUCTION PROCESS

For information on how to place a bid, how to use the BidButler or how an auction works, please refer to the Bidding or Auctionstopics of the "[Help](#)" Section on the Swoopo site. Every auction ends when the remaining time reaches zero and the user who was the last to bid then wins the auction. All other

3/10/2011

Terms and Conditions

Bids placed on the item expire and will not be credited back to your account nor will you be eligible for a refund for such Bids. The last bidder is determined based on the records in Swoopo's database and Swoopo's decision regarding who is the last bidder shall be final.

You understand and agree that Swoopo requires you to bid for auctioned items against other Swoopo users, some of whom may reside outside the United States. In such cases, users in other countries may not always be bidding on the exact same product in a single auction. To ensure the auction remains fair, the auction items in a single auction will be comparable and reasonably equivalent.

We do not represent or warrant that your Bid will be timely received or accepted by Swoopo site and you understand that our receipt of your Bid depends on several factors, some of which we have no control over, including your Internet connection, the equipment you are using to access our site, and other technological and/or telecommunication-based factors. You agree that Swoopo shall be held harmless from and against any and all claims, causes of action, expenses, costs, or losses arising from or related to any transaction in which your Bid is not received, delayed or otherwise rejected by Swoopo.

Swoopo reserves the right to add, reschedule or remove products from the Swoopo website at anytime without notice. An auction is deemed to have closed when the timer on the auctioned item counts "closed" and no users have placed a Bid. Users should be aware that the timer available to the user is an approximation which may be affected by network delays. The final decision of when an auction closes will be based on the timer used by Swoopo servers.

Some auctions may offer the "Swoop It Now" option where you can purchase the product during the auction time stated for a price which may be discounted by your Bids on that auction up to a certain limit. For further information on restrictions to "Swoop It Now", please read the Swoop it Now topic on the ["Help"](#) Section

Swoopo reserves the right to limit the number of auctions you can win within a specific time period. Please refer to the Auctions topic of the ["Help"](#) Section for further information.

A Bid submitted by you constitutes your offer to enter into a binding contract with Swoopo and in the event of winning an auction, you will receive a purchase offer for the item of the auction under the conditions set out in the related auction.

PAYMENT

Unless otherwise stated, all fees and prices are quoted in U.S. Dollars. You are responsible for paying all fees and applicable taxes associated with products or our sites and services in a timely manner with a valid payment method. If your payment method fails or your account is past due, we may collect fees owed using other collection mechanisms. (This includes charging other payment methods on file with us, retaining collection agencies and legal counsel, and for accounts over 180 days past due, deducting the amount owed from your PayPal account balance.) Swoopo reserves the right to withhold any outstanding deliveries and block your access to your account until payment in full of any amounts owed are received in full.

If you win an auction, you must actively confirm your win and purchase the auction item (including shipping costs) within 21 days of the auction end date. If an auction win has not been confirmed and purchased within the 21 day period, Swoopo reserves the right to withdraw the offer to conclude a purchase contract and your right to pay for and receive delivery of the auction item will be revoked. No auctions items will be delivered until the total price has been received by Swoopo. Swoopo reserves

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the right to charge you reasonable storage fees for items not paid for. Remember, all Bids placed in that auction expire and are non-refundable.

For more information in payment and acceptance of wins, please see the applicable topics in the "Help" Section of the Swoopo site.

DELIVERY

All items purchased from Swoopo are made pursuant to a shipment contract. This means that the risk of loss and title for such items pass to you upon delivery of the item to the carrier.

Unless otherwise stated, delivery will be made directly from our third party suppliers or from our warehouse to the shipping address provided by you. **Deliveries are made solely within the 50 states of the United States (explicitly excluding the U.S. sovereign territories of Guam, Puerto Rico and the U.S. Virgin Islands). Some restrictions or higher shipping costs may apply if the delivery address is in Alaska or Hawaii, please check notifications on the detail pages of the auctions in advance.** You acknowledge that delivery times vary and any delivery time indicated is provided only as a guide and is not guaranteed. Please contact our service department at support@swoopo.com if an item is not delivered within the indicated time so that we can work with you to address the issue. Swoopo shall be entitled to involve third parties to satisfy its contractual obligations without being required to notify the buyer. Obvious damage to the item from transport or packaging damaged during transport is to be reported to Swoopo upon taking delivery.

Should Swoopo not be able to deliver the item ordered, Swoopo shall be entitled to substitute the item with a comparable replacement product with the similar or better features, or provide a refund of the auction end price to you based upon your preference.

RETURNS/REFUNDS

If, within 14 days of delivery of an item, you decide you no longer want the item, Swoopo will refund you with the amount that you paid for the item as well as original delivery costs, provided that you have (i) returned the item to Swoopo, (ii) the item is still in its original packaging and (iii) the item is not damaged or used. Returns or refunds must be first initiated by contacting the Swoopo customer service team in writing (by letter or email) within the 14 day period in order to be executed. Please note that we cannot offer you a refund on the cost of the Bids that you placed on that auction or the return shipping cost.

Should Swoopo incur additional costs for insufficient postage on the return or for courier shipments and other irregular shipping methods that are over and above postal shipping costs, these costs will be deducted from any payment whatsoever paid to you. Sets/boxes can only be returned in their entirety.

Exceptions to the right to return are audio or video recordings, computer software that you have unsealed and other items noted by Swoopo on the Swoopo site. Such items are not eligible for return or refund.

The following contact details must be used:

Entertainment Shopping, Inc.

800 W. El Camino Real, Suite 200

Mountain View, CA 94040

swoopo.com/.../terms-and-conditions

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support@swoopo.com**INFORMATION INACCURACY DISCLAIMER**

From time to time there may be information on the website that may contain typographical errors, inaccuracies, or omissions that may relate to product descriptions, pricing, and availability. Swoopo reserves the right to correct any errors, inaccuracies or omissions and to change or update information at any time without prior notice (including after you have submitted your order). If a product offered by Swoopo is not as described, your sole remedy is to return it in unused condition pursuant to our return policy.

DISCLAIMER OF WARRANTY

We will pass through to you a manufacturer's limited warranty for any item that you purchase when we can reasonably do so; however, you understand and agree that we do not control or participate in warranty-related activity, and all warranty repairs or replacements must be made through the relevant manufacturer. Please be aware that some manufacturers will not honor warranties of products sold through auctions.

EXCEPT FOR THE WARRANTIES SET FORTH ABOVE, THIS SITE AND ALL INFORMATION, CONTENT, MATERIALS, PRODUCTS (INCLUDING SOFTWARE) AND SERVICES INCLUDED ON OR OTHERWISE MADE AVAILABLE TO YOU THROUGH THIS SITE ARE PROVIDED BY SWOOPPO ON AN "AS IS" AND "AS AVAILABLE" BASIS, UNLESS OTHERWISE SPECIFIED IN WRITING. NEITHER SWOOPPO, ITS AFFILIATES NOR ANY OF THEIR RESPECTIVE EMPLOYEES, AGENTS, THIRD PARTY CONTENT PROVIDERS, SUPPLIERS OR LICENSORS MAKES ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE OPERATION OF THIS SITE OR THE INFORMATION, CONTENT, MATERIALS, PRODUCTS (INCLUDING SOFTWARE) OR SERVICES INCLUDED ON OR OTHERWISE MADE AVAILABLE TO YOU THROUGH THIS SITE, UNLESS OTHERWISE SPECIFIED IN WRITING. YOU EXPRESSLY AGREE THAT YOUR USE OF THIS SITE IS AT YOUR SOLE RISK.

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LIMITATION OF LIABILITY

YOU AGREE THAT, EXCEPT AS EXPLICITLY SET FORTH HEREIN, SWOOPPO, ITS DIRECTORS, OFFICERS, EMPLOYEES, REPRESENTATIVES, SUCCESSORS, LICENSORS, AND SUPPLIERS SHALL NOT BE LIABLE TO YOU OR ANY THIRD PARTY FOR ANY OF THE FOLLOWING TYPES OF DAMAGES RELATED IN ANY WAY TO OUR RELATIONSHIP WITH YOU (INCLUDING OUR

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PRODUCTS, SERVICES, OR SITE CONTENT) OR THIRD-PARTY MATERIALS OR WEB SITES: INDIRECT, EXEMPLARY, SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES, OR DAMAGES FOR LOSS OF PROFITS OR GOODWILL, REVENUE, DATA OR USE, INCURRED BY YOU OR ANY THIRD PARTY, WHETHER IN AN ACTION IN CONTRACT OR TORT, RELATED TO OUR PRODUCTS OR YOUR ACCESS TO, AND USE OF, OUR SITES OR ANY OTHER HYPER-LINKED THIRD PARTY WEB SITE, EVEN IF WE HAVE BEEN ADVISED OF, OR ARE AWARE OF, THE POSSIBILITY OF SUCH DAMAGES.

NOTWITHSTANDING ANYTHING TO THE CONTRARY, OUR LIABILITY TO YOU FOR ANY DAMAGES ARISING FROM OR RELATED IN ANY WAY TO OUR RELATIONSHIP WITH YOU (INCLUDING OUR PRODUCTS, SERVICES, OR SITE CONTENT), OR THIRD-PARTY MATERIALS OR WEB SITES (FOR ANY CAUSE WHATSOEVER AND REGARDLESS OF THE FORM OF THE ACTION), WILL AT ALL TIMES BE LIMITED TO THE AMOUNT PAID TO SWOPO FOR THE APPLICABLE TRANSACTION GIVING RISE TO THE LIABILITY, OR, IF THERE IS NO PAID TRANSACTION RELATED TO THE LIABILITY, THE LESSER OF THE AMOUNTS PAID BY YOU TO SWOPO IN THE PRIOR TWELVE (12) MONTHS AND FIFTY DOLLARS (\$50).

CERTAIN STATE LAWS DO NOT ALLOW LIMITATIONS ON IMPLIED WARRANTIES OR THE EXCLUSION OR LIMITATION OF CERTAIN DAMAGES. IF THESE LAWS APPLY TO YOU, SOME OR ALL OF THE ABOVE DISCLAIMERS, EXCLUSIONS, OR LIMITATIONS MAY NOT APPLY TO YOU, AND YOU MIGHT HAVE ADDITIONAL RIGHTS.

SYSTEM OUTAGE/TEMPORARILY HALTED AUCTIONS

A system outage has occurred if no Bids can be submitted for items due to an unforeseeable disruption in a system. In such a case, auctions will be temporarily halted and the remaining times for the auctions, the current bidding price and the current highest bidder will be maintained. After the disruption has been resolved, the auctions will be continued and additional minutes will be added to the remaining times for the auctions. Temporarily halted auctions are clearly indicated. Bids placed on a temporarily halted auction shall not be credited back on a user's account and are not eligible for a refund for bids used or other costs incurred.

Swoopo provides no guarantee for the constant and uninterrupted availability of its website and technical systems. In addition to the provisions of limited liability set forth above, Swoopo shall not be liable for damage that occurs due to Bids submitted by you not being received by Swoopo or not being received promptly or not being considered as a consequence of technical faults.

INTELLECTUAL PROPERTY

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One or more patents applications owned by Swoopo may apply to this site and to the features and services accessible via the site.

SERVICE AND SUPPORT FOR PURCHASED PRODUCTS

All requests for technical service and support should be made directly to the manufacturer in accordance with their terms and conditions.

PRIVACY

The protection of your data is very important to us. For more information on the collection, processing, and use of personal data, please read our [Privacy Policy](#).

CHANGES TO THE TERMS

Swoopo may make changes to these Terms from time to time. When these changes are made, we will make a new copy of the Terms available to you from within, or through, the Swoopo services.

You understand and agree that if you use the Services after the date on which the Terms have changed, Swoopo will treat your use as acceptance of the updated Terms.

ENDING YOUR RELATIONSHIP WITH SWOPOO

If you want to terminate your legal agreement with Swoopo, you may do so by (a) notifying Swoopo at any time and (b) closing your accounts for all of the Services which you use, where Swoopo has made this option available to you. Your notice should be sent, in writing or via email, to Swoopo's address which is set out at the beginning of these Terms.

Swoopo may at any time, terminate its legal agreement with you if:

(A) you have breached any provision of the Terms (or have acted in manner which clearly shows that you do not intend to, or are unable to comply with the provisions of the Terms); or

(B) Swoopo is required to do so by law (for example, where the provision of the Services to you is, or becomes, unlawful); or

(C) the provision of the Services to you by Swoopo is, in Swoopo's opinion, no longer commercially viable.

When these Terms come to an end, all of the legal rights, obligations and liabilities that you and Swoopo have benefited from, been subject to (or which have accrued over time whilst the Terms have been in force) or which are expressed to continue indefinitely, shall be unaffected by this cessation, and the provisions of the General Legal Terms below shall continue to apply to such rights, obligations and liabilities indefinitely.

DMCA Policy

If you are notifying Swoopo of alleged copyright infringement, please be sure to provide the following

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information in the form required by 17 USC Section 512:

1. A description of the copyrighted work that you allege is being infringed, or, if multiple copyrighted covered by a single notification, a representative list of such works;
2. A description of the allegedly infringing material and information sufficient to permit us to locate the material;
3. Information reasonably sufficient to permit us to contact you, such as an address, telephone number, and/or an electronic mail address;
4. A statement by you that you have a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, or its agent, or the law; and
5. A statement by you that the information in the notification is accurate and that you have the authority to enforce the copyrights that are claimed to be infringed.

Designated Agent for Notification of Claimed Copyright Infringement

NAME: Britta Färber

ADDRESS: Domagkstr. 34 - 80807 München, Germany

EMAIL: BFaerber@swoopo.com

FAX: +49 (0)89- 4522886- 55

We may terminate the privileges of any user who uses the Swoopo sites unlawfully to transmit copyrighted material without a license, express consent, valid defense or fair use exemption to do so.

GENERAL LEGAL TERMS

Sometimes when you use the Services, you may (as a result of, or through your use of the Services) use a service or download a piece of software, or purchase goods, which are provided by another person or company. Your use of these other services, software or goods may be subject to separate terms between you and the company or person concerned. If so, the Terms do not affect your legal relationship with these other companies or individuals.

The Terms constitute the whole legal agreement between you and Swoopo and govern your use of the Services (but excluding any services which Swoopo may provide to you under a separate written agreement), and completely replace any prior agreements between you and Swoopo in relation to the Services.

You agree that Swoopo may provide you with notices, including those regarding changes to the Terms, by email, regular mail, or postings on the Services.

You agree that if Swoopo does not exercise or enforce any legal right or remedy which is contained in the Terms (or which Swoopo has the benefit of under any applicable law), this will not be taken to be a formal waiver of Swoopo's rights and that those rights or remedies will still be available to Swoopo.

If any court of law, having the jurisdiction to decide on this matter, rules that any provision of these

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Terms is invalid, then that provision will be removed from the Terms without affecting the rest of the Terms. The remaining provisions of the Terms will continue to be valid and enforceable.

The Terms, and your relationship with Swoopo under the Terms, shall be governed by the laws of the State of California without regard to its conflict of laws provisions. You and Swoopo agree to submit to the exclusive jurisdiction of the courts located within the county of Santa Clara, California to resolve any legal matter arising from the Terms. Notwithstanding this, you agree that Swoopo shall still be allowed to apply for injunctive remedies (or an equivalent type of urgent legal relief) in any jurisdiction. The UN Convention on the International Sale of Goods shall not apply.

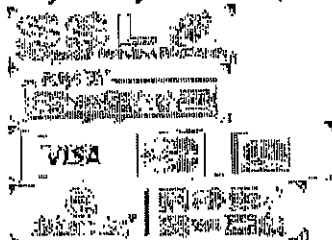
The contract between you and Swoopo is binding on the parties and on their respective successors and assigns. You may not transfer, assign, charge or otherwise dispose of any contract formed under these Terms or any of their rights or obligations without Swoopo's prior written consent.


These Terms set forth the entire understanding and agreement between us with respect to the subject matter hereof. The following Sections survive any termination of these Terms: Payment (with respect to fees or amounts owed for our services or products), Disclaimer of Warranties, Limitation of Liability, Intellectual Property and General Legal Terms.

Note:

We would like to advise all users to monitor their bidding practices. Placing bids online at www.swoopo.com frequently or repeatedly can incur high costs. Users should therefore pay attention to their bidding practices and check their charges regularly.

Pay safely on Swoopo:



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